No. 15,480

IN THE

United States Court of Appeals

For the Ninth Circuit

J. C. MILLETT Co., a corporation doing business as Key Distributing Co.,
Appellant,

vs.

DISTILLERS DISTRIBUTING CORPORATION,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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PART ONE.

PRELIMINARY STATEMENT AND REFERENCES.

This is an appeal from a judgment, in a removed cause, in an action seeking damages upon breaches and repudiation of a written contract for the sale and purchase, for resale and distribution, of alcoholic beverages within the Counties of Alameda and Contra Costa, State of California.

References herein are as follows: plaintiff-appellant, *plaintiff;* defendant-appellee, *defendant;* State of Cal-

ifornia, *the state;* general references herein to statutes are to those of the state; Alcoholic Beverage Control Act, Sections 23,000 through 25,762 of the Business and Professions Code of the state, *the act,* and words and expressions therein defined are, unless otherwise indicated, used herein in the sense contemplated therein; Rules of Civil Procedures, *the rules;* transcript of Record, "T", with page given, and to pleadings and filings below by designations thereof in the trial Court.

Unless otherwise indicated, insertions, omissions and emphasis in quotations herein are supplied by counsel.

PART TWO.

STATEMENTS AS TO JURISDICTION AND OF THE CASE.

I.

STATEMENT AS TO JURISDICTION.

Jurisdiction of the District Court was invoked under Title 28, United States Code, Sections 1441 and 1332, reading in part:

Section 1441:

> "(a) * * * any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending";

Section 1332:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter

> in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States;"

upon the allegations of the verified complaint, (T 3-13) and by petition for removal and stipulation substituting defendant (T13), from which it appears that plaintiff is a corporation duly organized and existing under the laws of the State of California and defendant is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware,[1] and allegations of plaintiff's damages sustained by the breaches of contract set forth in the complaint in the three respective causes of action in the amounts of $25,000, $25,000 and $100,000 (T8, 9 and 12).

The jurisdiction of this Court has been invoked under Title 28, United States Code, Section 1291, reading in part:

> "The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States * * *",

by the timely taking of the instant appeal from the judgment of the District Court (T43-44) upon findings of fact (T38), and judgment providing, in part:

> "Now, therefore, * * * It Is Ordered and Adjudged that plaintiff take nothing by its action

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[1]Responsive to the pleadings, stipulations and orders, the District Court in its findings (T39) found as follows:

> "That it is true that this action involves a controversy which is wholly between citizens of different states and that the matter in controversy exceeds the sum of $3,000.00, exclusive of interests and costs."

and that defendant have judgment for its costs and disbursements herein expended * * *"

II.

BRIEF STATEMENT OF THE CASE.

This action was instituted in the state Court by plaintiff, a wholesaler of alcoholic beverages and other products in the state, against defendant, an importer and manufacturer's agent, merchandising alcoholic beverages in interstate and foreign commerce, for damages upon breaches of contract.

The verified complaint, in conformity to state practice, sets forth the facts of the case in detail alleging the three independent causes of action, each relating to one of the independent breaches of contract.

The contract in suit is in writing, was made and entered into between plaintiff and defendant's predecessor interest, Calvert Distillers Corporation (herein called Calvert), as of the 14th day of March, 1952, and expressly provides:

> "This agreement shall be interpreted under the laws of the State of California." (Plaintiff's Exhibit 1, par. 15, appended hereto as Appendix I.)

The stated and principal purposes of the contract was to provide for the appointment of plaintiff as a Calvert distributor[2] in the Counties of Alameda and

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[2]This relationship, as contemplated, by the parties at this time and place, is as follows:

> "The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale.

Contra Costa in the state, for the purchase by plaintiff for resale, from Calvert of the products of Calvert Distillers Co. and Carstairs Distilling Co., Inc., within said areas and to control the method of conducting these operations. The original contract term was the period, March 14 to December 31, 1952, and provided for renewal at the option of plaintiff and, alternatively, for the return of plaintiff's unsold inventories of such merchandise remaining on hand—in the event the plaintiff did not exercise its option.

One of the provisions of the contract (par. 6) required Calvert to promote the sale of its products in support of plaintiff's efforts in the distribution and resale of such products, and the first cause of action of the complaint sets forth the breach of this undertaking (T4-8).

Another provision of the contract (par. 5) bound Calvert to supply its products to plaintiff, and the second cause of action in the instant complaint alleges a breach of this undertaking by Calvert (T9), in that an order was placed during the operative period of the contract for 900 cases of products described in the contract which were not delivered in accordance with the contract or otherwise.

The third cause of action alleges a breach, or repudiation, of the renewal provision of the contract (par. 11 and 12) by Calvert, in refusing to recognize

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On the other hand, it is more than a mere sales contract. It partakes of substantial aspects of both."

J. C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.S. 484, 492.

and carry out the contract during the renewed period created by plaintiff's exercise of its option to renew the existing contract (T9-13).

Defendant's answer contains admissions of many of the facts material to the respective breaches set forth in the complaint.

There was only a brief trial of the factual issues and, by stipulation, the parties submitted the case on the issues as to liability, with the issues as to damages reserved, the stipulation (T151-152) reading as follows:

> "That plaintiff is ready and willing to offer proof of loss and damage relating to the First Cause, Second Cause and Third Cause of Action, but defers such offer of proof without prejudice to either party, by stipulation of counsel in open court, pending the Court's determination of liability."

With the exception of the damage issues, plaintiff offered proof in support of each of the material allegations of its complaint not admitted by defendant's answer. Defendant offered no testimony and the only evidence submitted in its behalf consisted of stipulations as to certain formal matters and the introduction of certain interrogatories and answers to interrogatories propounded by defendant to plaintiff (T93-100). Notwithstanding the express reservation of the damage issues pending determination of the liability issues and questions, the Court ultimately made findings (T41, finding XII) that plaintiff had not been damaged in the premises.

Originally it was proposed that the action be determined upon a motion to dismiss made by defendant at the conclusion of plaintiff's case in chief (T137-139; 141-146; 33-34). Subsequently the Court determined that the action should not be resolved upon the motion and directed that findings and a formal judgment be submitted (T148-152; 153-155).

In brief, defendant's motion to dismiss was based upon the assertion of an obscure theory of unlawful purpose of the contract (T33-34; T52-78; T137-139).

Prior to the submission of the motion and the submission of findings, plaintiff moved for leave to file an amendment to its complaint to conform the allegations of Paragraphs VII through X of the first cause of action to the proof (T30-33) but plaintiff's motion was denied by the trial Court (T146; 141-144; 155-156).

A. SUMMARY OF THE ISSUES, ADMISSIONS, EVIDENCE AND FINDINGS, AS RELATED TO THE RESPECTIVE CAUSES OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT.

1. The First Cause of Action.

There is no issue raised as to the formal matters set forth in the first six paragraphs of the first cause of action of plaintiff's complaint (T3-6) relating to the incorporation, license status and license privileges of the respective parties, methods of doing business as between the parties and with third persons, etc., etc.

The seventh and ninth paragraphs of the first cause of action of plaintiff's complaint tender the issues as to the breach of paragraph 6 of the contract, reading as follows:

> "6. *Calvert agrees to promote*[3] *the sales of its products* and to advertise its products *in a manner consistent with the type of merchandise in cases sold* * * *".

The counterpart to the undertaking contained in the paragraph 6, last quoted, is set forth in paragraph 7 of the contract imposing upon plaintiff the following duties with respect to promotion of Calvert's products as follows:

> "Distributor agrees it will maintain an adequate sales force properly to represent and *to promote the sale of Calvert products in its designated territory.* Distributor agrees to keep this sales force properly informed as to all Calvert policies and to train them to sell merchandise in a manner which shall be a credit to distributor and to Calvert. * * *".

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[3]The usage and custom of solicitation of sales, as a part of manufacturers' "promotion" in this field of merchandising in the area at the times herein involved are stated in the case of

J. C. Millett Co. v. Park & Tilford Distilleries Co., 123 F.S. 484, 488,

as follows:

> *"As is normal in the industry, this sales representative called upon retailers to solicit orders for Park & Tilford distributors. He did not take signed orders."*

It is substantive state law that contracting parties have contracted in reference to such usage and custom, which form a part of the contract (*Guipre v. Kurt Hitke & Co.,* 109 Cal. App. (2d) 7, 14, 240 P. (2d) 312; *Covelly v. C.A.B. Construction Co.,* 110 Cal. (2d) 30, 33, 240 P. (2d) 87 (hearing, Supreme Court, denied).

Paragraphs VII and IX of the complaint (T6, 7; 7-8) allege as follows:

"At all times herein mentioned the defendants have employed salesmen, sometimes known as 'specialty men', and *directed and required said salesmen to call upon the customers of its said distributors in purported support of the sale of defendants' products by such distributors to such customers;* that said salesmen have at such times solicited orders and sales as defined in said Act, for defendants' products of and to persons other than those licensed in this state as wholesalers, manufacturers and rectifiers, *and have submitted the orders so solicited and obtained to defendant's said distributors in such area for delivery thereof.*"

* * *

"One of the conditions of said agreement was that *defendants agreed to promote the sale of its products by continuing to employ salesmen* sometimes known as 'specialty men' within the counties of Alameda and Contra Costa *in the manner and for purpose as specified* in the preceding paragraph 7 hereof, *and submit the orders so solicited* and obtained within the said two counties *to Key Distributing Co. for delivery.* On and after March 14, 1952, when the said written agreement was executed between the parties hereto, the *defendants did continue to employ such salesmen and said salesmen continued to solicit and obtain orders in purported support of the sales of defendants products, but failed, neglected and refused to submit all of its orders to Key Distributing Co. for delivery but submitted a substantial portion thereof to other competing wholesale dis-*

tributors of defendant in the said two counties for delivery."

Defendant's answer to the allegations last quoted sets forth a general denial of the allegations, except admissions as to its method of distributing its products through wholesale licensees, its limiting and restricting the sale of its products to such distributors, and the following:

"* * * at all times mentioned in plaintiff's complaint it has employed salesmen, sometimes known as 'specialty men'; (T15).

By its answers to interrogatories propounded by plaintiff, the further admissions appear, namely (T105):

"'*Specialty men' employed by defendant* during the period January 1, 1952, to date were and are instructed that if *in the course of their promotional work* a retailer indicates that he desires to purchase defendant's products, that *information is to be passed along to the wholesaler of the retailer's choice.*"

"*If in the course of their promotional work defendant's 'specialty men' discovered that a retailer desired to purchase defendant's products,* they would ask the retailer for the name of the distributor with whom the retailer desired to do business. After the retailer had designated a distributor, *the distributor selected would be notified.*"

Plaintiff's witness, Franklin Lewis, (T110-136) described his functions, as one of defendant's specialty men, in part as follows (T117):

"*My work consisted of promoting the sale of Calvert merchandise* by placing point of sale material; showing our newspaper, magazine, billboard and card programs; to tell the Calvert story.

"We had a story to tell at the time about the merits of our merchandise over and above the competition's merchandise. *To work with the wholesale people.* To, as we called it, 'high spot' with them when they felt that they would like to sell our merchandise against competitive labels, particularly at the bar level. I am talking now in terms of plus business . . .

* * *

" 'High Spot' merely means, your Honor, that at the request of the wholesale salesman, if he has a specific call—for example, for me to make a specific appointment with him, make a call and tell my story as against whatever we are trying to sell against. *The wholesale man consummates the sale if he is able to. I contribute what I think I can.*

* * *

"*As I say, my job was to promote* the sale of Calvert merchandise, *help the wholesale people in any possible way that I could.*

* * *

"Well, *during most of the time that we had the dual arrangement with Key and Julliard,* I worked up at the Julliard House, but also worked with the two people periodically when my geographic area was the area in which they worked" (T118).

* * *

"Now, in calling on retailers, *did you, as part of your work for Calvert, call on retailers* who were

purchasing or not purchasing Calvert's products to see if anything could be done *to promote that production, independently of any particular wholesaler's previous appointment?* Do you understand what I mean?

* * *

"Yes."

"In that connection, did you call for the purpose of presenting such point-of-sale material?"

"That and specific approach to whatever our particular promotion was at that time of the year, and try to increase the sale of our goods." (T119-120.)

* * *

"Now, in your independent calls on retailers what happened, if it did happen, *when the retailer needed some further Calvert products* to complete his stock or, if he didn't have any, to install the item in his place? *What would you do if you found that situation?"*

* * *

"Allowing that there was any appreciable quantity, *contract the wholesaler specified by the retailer, and he would consummate the sale if possible either with the help of the specialty man or by himself."*

"Now, you did that, did you, or did you not?"

"Yes, indeed I did."

"Were you in general instructed to carry out the activities you have described by your superiors?"

"Yes." (T124-125.)

Concerning the breach by Calvert of the undertaking to promote its products, in support of plain-

tiff's resale activities, this witness further testified, in part (T124-125):

"Now, with relation to the summer of 1952, June or July, *was there any change made in your activities* on behalf of Calvert in those things that you have been describing?"

"Yes, there was."

"Did that all come about by reason of something said to you by Calvert personnel?"

"Yes." . . .

* * *

"What, if anything, was said with regard to promotions by you in your work in the Key Distributing Branch of the plaintiff?" (T127.)

* * *

"I was told specifically—there was another man involved in this, too. *We were both told to withdraw all support to Key Distributing Company* and not even to put—this isn't a direct quote, but it is as close as I can remember—not even to put our foot in the door." * * *

"After you were so directed by Mr. Garfield, and either Mr. Taube or Mr. Garfield in Mr. Taube's presence, *did you then give any assistance to Key Distributing branch of the plaintiff?"*

"None whatever."

"In the event a retailer appeared in need or expressed a desire to purchase Calvert products, *what if anything were you instructed to say to him in that connection?"*

"Well merely, — I mean, *it's a trick of the trade. It's a way to emphasize one and de-emphasize the other,* and over the years you know how to do that."

"And you were so instructed?"
"That is correct." * * *
"And you gave no help whatever?"
"None whatever." (129-131.)

It is substantive state law that in every contract there is an implied covenant and undertaking[4] that neither party will do any act which will deprive the other contracting party of the benefits of the contract.

In addition to the admissions and denials contained in its answer to the first cause of action of plaintiff's complaint, defendants (T17) asserted a purported special defense of "illegality" as follows:

> ". . . defendant alleges that if, as alleged in paragraph IX * * * one of the conditions of the written agreement between the parties * * * was that this defendant agreed to promote the sale of its products by continuing to employ salesmen * * * for the purpose specified in paragraph VII * * * said condition was and still is illegal, null and void, because it is and was at all times mentioned * * * unlawful for the defendant * * * to solicit[5]

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[4]A recent restatement of this principle appears in the case of *Universal Sales Corp. v. Cal. etc. Mfg. Co.*, 20 Cal. (2d) 751, 771, 128 P. (2d) 665; in part:

> "A further matter to be considered in connection with the trial courts' findings, as above recited, is the relationship existing between the parties pursuant to their agreement regarding their cooperative undertaking. *In every contract there is an implied covenant that neither party shall do anything which will have effect of destroying or injurying the right of the other party to receive the fruits of the contract,* which means that in every contract there exists an implied covenant of good faith and fair dealing. * * *"

[5]Section 23773 of the act (relating to the privileges of Calvert's and defendant's license) expressely provides:

> "*Agents soliciting orders.* The provisions of Sections 23771 and 23772 *do not prevent agents or employees of a distilled*

or obtain orders for alcoholic beverages from persons licensed * * * to sell alcoholic beverages at retail and/or from unlicensed persons * * *"

The findings of the trial Court responsive to the first cause of action in plaintiff's complaint are the following (T39-40) (Paragraphs IV and V):

"That the allegations contained in paragraph IX of the first cause of action of plaintiff's complaint are, and each of them is, untrue.

"That the allegations contained in paragraph II of defendant's second, separate and distinct defense to plaintiff's first cause of action are, and each of them is, true."

The only conclusions of law responsive to this subject matter are found in Conclusions I and IV (T41-42)and read in material part as follows:

"The contract made and entered into by Calvert Distillers Corporation and plaintiff . . . was not breached by Calvert Distillers Corporation in any respect.

* * *

"The contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void."

2. Second Cause of Action.

Plaintiff's second cause of action realleges, by reference, all of the allegations contained in the first cause of action except paragraphs IX and X (T9) and further alleges as follows:

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spirits manufacturer located without this State *from soliciting orders for distilled spirits within the State.*"

> "On December 15, 1952, *while the said agreement* dated March 14th, 1952 *was still in full force and effect, and pursuant to and in accordance with the terms* thereof, the Key Distributing Co. *executed and delivered to the defendants a written purchase order requesting shipment of nine hundred (900) cases of various sizes of the products of the defendants.* Copy of said purchase order is attached hereto marked 'Exhibit 2' and incorporated herein by this reference."

The third paragraph alleges that the order was not carried out and the fact and amount of plaintiff's damage by reason of the non-delivery of the merchandise ordered (T9).

In answer to the second cause of action (T18-22) defendant (T18) expressly admitted the allegations contained in paragraph II as above quoted and further admitted "that defendant did not ship and deliver to the Key Distributing Co. the said 900 cases of products or any portion thereof".

By way of special defenses, defendant quoted paragraphs 5 and 12 of the contract (appendix) and averred (T19):

> "That defendant did not ship and deliver to Key Distributing Co. the merchandise listed in the written purchase order executed and delivered to defendant by Key Distributing Company in December 15, because said order would have resulted in an inventory of defendant's products . . . greater than a 45-day inventory . . .

and

> that the merchandise listed . . . if shipped by defendant, would have arrived . . . on or about the

> date the said agreement between the parties terminated; that it would have been an idle act for defendant to ship and deliver to Key Distributing Co. the merchandise specified in said written purchase order because, under the terms of paragraphs 12 of the said agreement between the parties, Key Distributing Co. would have been obligated to return[6] said merchandise to the defendant at its invoice price."

The only evidence offered by defendant throughout the trial of the action, related to the subject matter of the "special defenses" just noted, consisted of the answers to interrogatories by defendant to plaintiff (T94-95; T100).

There was no showing that the order was not in fact filled for any reason related to plaintiff's inventory or prospective inventory, or that such refusal was stated to have been made upon any such ground. There is no showing as to the date of arrival of the ordered merchandise or of the inventory on the date when it would have been delivered, defendant expressly refusing to disclose this fact (T92).

The data submitted by defendant by means of the interrogatories (T94-95) was that plaintiff had 1410 assorted cases of defendant's merchandise on hand on December 15, 1952, when the order was placed; and, with the addition of the 900 cases plaintiff would have had a total of 2310 cases; whereas, the average 45

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[6]Paragraph 12 of the contract provided a "grace period" of 30 days for such return, in the event plaintiff's option was not renewed. As hereinafter noted plaintiff had exercised its option prior to this refusal to deliver.

days' inventory was 1655 cases and, with the shipment, would have been increased to 2122 cases; however, the same data (T100) shows sales for the preceeding year of 1139 cases, during the month of December, which would have resulted in a net inventory of only 983 cases, had the delivery been made (T100).

Defendant's showing further ignores the fact of common knowledge that the sales of consumer's goods, particularly including alcoholic beverages, during the month of December and particularly following the 15th day of that month exceeds the rate of sales in any other period during the year; and further ignores the practice, of common knowledge and official recognition, of quantity sales requiring assortment of sizes and products (paragraphs 99, 100 and 101 of California Administrative Code, Title IV, in part):

> "Distilled spirits included within a single fair trade contract *may be assorted for quantity discounts* * * *. Quantity discounts may be based on sales and deliveries to one purchaser within 24 hours only."

Defendant's showing further ignores the provisions of Paragraph 12 of the contract (Appendix) which permitted the plaintiff a period of 30 days after December 31, 1952, in which to dispose of plaintiff's remaining inventory of this merchandise, in the event the contract were not renewed. (See the third separate defense to plaintiff's second cause of action (T20).)

As a fourth separate defense defendant purported to reassert its claim of "illegality" of the provision of

the agreement relating to "promotions" (T21) as a special defense to a second cause of action; and, as a fifth special defense, averred as "in mitigation of damages" a subsequent return[7] by plaintiff to defendant of an inventory remaining on hand of February 1953 in the amount of 740 cases.

The findings (T40) recite that the facts as alleged in paragraph II of plaintiff's second cause of action to be true and

> "that it is true that on December 15, 1952, plaintiff executed and delivered to Calvert Distillers Corporation a written purchase order requesting shipment of 900 cases of various sizes of the products of Calvert Distillers Corporation; and that it is true that Calvert Distillers Corporation did not ship and deliver to the plaintiff the 900 cases of products ordered . . . but that it is untrue that Calvert Distillers Corporation did not have a lawful reason for not shipping to plaintiff the products requested in its order * * *";

and

> "That the allegations contained in paragraph II of defendant's second * * * defense of plaintiff's second alleged cause of action are, and each of them is true."

The only conclusions of law responsive to this subject matter is conclusions I (T41) to the effect that Calvert had not violated the written agreement in any respect.

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[7]Because this lot was a broken line of merchandise, plaintiff was required by the act (section 24751) to offer such return as a condition to disposing of the odd lot as a "close out".

3. Third Cause of Action.

In plaintiff's third cause of action (T9-13) the allegations contained in first cause of action, excepting paragraphs IX and X, are realleged by reference.

The second paragraph of this cause of action alleges full compliance and performance on plaintiff's part (T10).

The third paragraph of this cause of action alleges as follows (T10-11):

> "The written agreement between the parties hereto dated March 14, 1952 and hereinabove referred to included a provision therein reading as follows:
>
> > 11. This contract shall be effective for a period of ten months, from March 1, 1952. If distributor desires to renew the contract, he shall notify Calvert not less than 30 days before December 31st 1952.
>
> The foregoing provisions of the said agreement was intended by the parties thereto to mean, and was interpreted by the plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendants not less than 30 days' notice of such intention prior to December 31, 1952."

The fourth paragraph of this cause of action alleges plaintiff's election to renew the contract in accordance with the provisions of the contract immediately above quoted, the giving of notice of such election,

including by reference the written notice (appended to the complaint as Exhibit 3).

The fifth paragraph alleges defendant's refusal to recognize plaintiff's exercise of the option and defendant's repudiation of the contract insofar as related to plaintiff's option to renew, together with plaintiff's ability and willingness to continue performance of the contract created by the exercise of its option. The concluding paragraph (T12) alleges plaintiff's damages suffered by reason of defendant's repudiation of the contract's respect to the option to renew the contract for an additional period.

Defendant's answer realleges its responses to the allegations included in the third cause of action by reference (T23) and (T22; T23-24) and set forth the following admissions:

> ". . . defendant admits that the written agreement between the parties, dated March 14, 1952, included the provision set forth in said paragraph III; * * * *defendant admits that the said provision was interpreted by plaintiff to mean that in the event the said agreement was then in full force and effect and the Key Distributing Co. desired to renew and extend the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving defendant not less than thirty (30) days' notice of such intention* prior to December 13, 1952; * * * *defendant admits it received the letter attached to the complaint as 'Exhibit 3' while the agreement of March 14, 1952 was still in full force and effect;* * * * defendant admits that it has not renewed the agreement between the parties, dated March 14, 1952."

By way of special defenses to the third cause of action (T25-27) defendant asserted (T25) as follows:

> "* * * that said provision was intended by the parties to mean that in the event the agreement was then in full force and effect and the Key Distributing Co. desired to renew said agreement, it was to apply for said renewal by giving notice to defendant of its desire to renew not less than thirty (30) days prior to December 31, 1952, and that thereafter the defendant had the right to accept or reject said application for renewal; that said provision did not confer and was not intended by the parties to confer upon plaintiff the right to renew said agreement;"

and purported to reassert the purported "illegality" defense earlier noted, stating in part:

> "* * * defendant avers that *said written agreement was at all times mentioned in plaintiff's third alleged cause of action and still is illegal, null and void* because it is and at all times mentioned in plaintiff's complaint was unlawful for the defendant under the licenses which it holds * * * to solicit or obtain orders * * *".

Defendant offered no evidence upon this subject matter.

The only findings responsive to the subject matter of the third cause of action are set forth in findings X and XI (T40-41) to the effect that the contract contained the provisions of paragraph 11 and the following:

> "It is untrue that the provisions of paragraph 11 of the contract between Calvert Distillers Corporation and plaintiff dated March 14, 1952, were

intended by the parties to mean that in the event the said agreement was then in full force and effect and Key Distributing Co. desired to renew the said agreement, it had the sole and exclusive option to so extend and renew the same upon giving Calvert Distillers Corporation not less than 30 days' notice of such intention prior to December 31, 1952."

The only conclusions of law responsive to the subject matter are contained in conclusions II, III and IV to the effect that the contract "terminated by its terms on December 31, 1952," the provisions of paragraph XI of the contract "did not give plaintiff an option to renew said contract and "the contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action was and is illegal, null and void."

* * *

B. THE FINDINGS, CONCLUSIONS AND JUDGMENT AS RELATED TO THE EVIDENCE AND THE ISSUES.

It is clear from the record that the decision below was actually made upon the repetitive motions of defendant directed at plaintiff's complaint and defendant's "special" defenses; and the determination to attempt resolution of the issues upon a purportedly factual basis resulted from the realization that defendant's admissions had eliminated most of the material issues and plaintiff had proffered proof to sustain its case upon the remaining contested issues (T33-34, written motion to dismiss, T137-140, oral motion and

tentative ruling, T145-146 and 148-152, discussion and direction to prepare findings).

The latter colloquy and direction to prepare findings "on the merits" is, in part (T140, 149-150, 152):

> "The Court: *I would like to have these motions that you have indicated typed and tomorrow morning I will dispose of the case.*
>
> "Mr. Ehrlich: Thank you. . . ."
>
> * * *
>
> "The Court: *I have in mind this record and a judgment on this record.* With the energy your opponent has here, I am sure he is going across the hall, and I don't want to engage in an idle act here. That is all I am thinking about.
>
> * * *
>
> "I think a proper record should be made here and *I am not altogether satisfied with this record, disposing of it on the motion itself.* However if that is your position, I will have to act.
>
> "Mr. Ehrlich: The thought occurred to me I would like to consider whether I should ask for a judgment in view of the fact that we did submit some evidence on our side in connection with the pretrial.
>
> * * *
>
> "The Court: That is what I had in mind. I want to get up a proper record here and give both sides an equal opportunity.
>
> "Mr. Ehrlich: What I am concerned about now is the fact that *we did introduce on our part these admissions from the interrogatories, and it might be considered that we did put in evidence. Accordingly, I think we ought to comply with Rule 21 and have a judgment on the merits.*

"The Court: If you are not satisfied with that, I will open up this case and give either side an opportunity.

"Mr. Ehrlich: *I am satisfied with our record. I have no further proof.*"

"The Court: Prepare the judgment in accordance with the rules I just called your attention to—judgment and findings.

"Mr. Ehrlich: For the defendant, your Honor.

"The Court: Yes. . . ."

To the proposed findings and judgment (T38-43) plaintiff filed formal and detailed objections (T35-38), which were overruled—even as to the findings and conclusions to the further effect that plaintiff was not damaged by the occurrences set forth in the complaint (finding XII, T41, and conclusions V, T42), although this issue and subject matter were expressly reserved by the stipulation of the parties approved by the Court below (T151-152).

As conclusions of law, it was declared generally that: (1) the contract was not breached by Calvert . . . in any respect"; (2) the contract "terminated by its terms on December 31, 1952"; (3) the contract "did not give plaintiff an option to renew said contract"; and (4) the "contract pleaded in plaintiff's complaint and relied upon by plaintiff in this action is illegal, null and void" (T41-42).

The final conclusion (par. V, T41) and the judgment (T43) are that plaintiff take nothing by the action.

PART THREE.

SPECIFICATION OF ERRORS.

Categorically, plaintiff respectfully specifies error in each of the rulings of the trial Court reserved to it by Rule 31 of the rules and to each of the objections and specifications set forth in its written objections (T35-38) to the proposed findings, conclusions and judgment, and statement of points and designation of record below (T45-46).

In accordance with subdivision (d) of Rule 18, Rules of Practice in this Court, plaintiff respectfully specifies the following errors as particularly relied upon for reversal herein of the instant judgment, namely:

I.

The judgment is erroneous and contrary to law in denying relief required by substantive statutory enactments and rules of judicial decision of the state and applicable to the admitted and established facts;

II.

The material findings are contrary to the evidence in the cause with respect to each material issue presented by the pleadings, evidence, stipulations and submissions of the parties, particularly including findings IV, V, VIII, IX, XI, and XII (T39-41);

III.

Material findings are outside of, and do not respond to, the material issues, particularly including findings V, VIII, IX and XII (T40-41);

IV.

Findings V, VIII, IX and XI are conclusions of law and are without support in the findings or in the evidence (T40-41);

V.

The judgment (T43) is not supported by the findings;

VI.

The conclusions of law (T41-42) are not supported by the findings, evidence or pleadings;

VII.

The conclusions of law (T91-92) erroneously state the principles of law (A) adverted to therein; (B) related to the issues and evidence and (C) related to the findings;

VIII.

The conclusions of law do not support the judgment; and

IX.

Plaintiff was prevented from having a fair trial and was materially prejudiced by the sustaining of defendant's objections (A) to the receipt in evidence of the interrogatories and answers of the parties, (B) to the receipt of evidence relating to the interpretation of the contract, and (C) to the motion for leave to file amendments of the complaint to conform to the proof received in the trial of this cause.

PART FOUR.

ARGUMENT AND AUTHORITIES.

I.

SUMMARY OF ARGUMENT.

For such assistance as it may be in pointing up the outline of principle and authorities following, we briefly recapitulate the factual situation as established by the record and uncontradicted evidence detailed in the brief statement of the case, Part Two, II, supra.

At the outset, it must be recognized that the cause was not resolved upon the theory and basis on which it was subjectively determined, but on patently insupportable motions based upon a disconnected and unsustained claim of "illegality" advanced by defendant to a contract having been (1) prepared (2) executed and (3) expressly (and so far successfully) asserted by defendant in defense of each cause of action based upon the same contract.

In consequence, a pervading sense of unreality inheres in the findings, conclusions and the concluding portions of the trial, hence we proceed to the principal elements of the case as set forth in the pleadings and as actually tried.

The instant type of contract and the business relationship thereby created has become one of the most common in merchandising in this country.

See Professor Williston's (4th edition) work on contracts, Section 1027A, and authorities cited.

Since this relationship has been authoritatively analyzed in respect to this immediate field of merchan-

dising, at the same place and time as herein involved, in the case of

J. C. Millett Co. v. Park & Tilford, etc., supra, (123 F.S. 484),

we take the liberty of brief quotation from that opinion of certain aspects of the industry background and business purposes of the instant parties, in lieu of original statement, namely (pp. 486-490, 492, 495):

"The major issues in this suit hinge upon the character of the relationship of the parties under which it is conceded plaintiff bought defendant's products as a wholesaler and resold them to retail outlets. It is likewise agreed by both parties that this relationship existed for only about seven months and was terminated by the defendant.

* * *

"Both parties were represented by men of long experience in the liquor business. Very few details were discussed but plaintiff expressly agreed to take on the 'distributorship' of defendant's products.

"The factual setting of the parties and the condition of the industry at that time must necessarily be set out if the discussions are to be understood.

"Plaintiff, J. C. Millett Company (hereinafter referred to as Millett) is a California Corporation licensed as a wholesale distributor and importer of alcoholic beverages which has been actively engaged in the business since the repeal of prohibition.

"Defendant . . . manufactures and imports from abroad, alcoholic beverages. *Its products are trade*

marked and such products are unavailable under such trade names from any other source. It engages in business in California and in this District.

"Millett, in common with other liquor distributors in Northern California distributed various 'lines' of alcoholic beverages. Within the trade a 'line' is the aggregate of various types of distilled spirits bottled in different sizes, which are sold in a group to a wholesaler by a particular distiller.

"In late 1950 and in 1951 the liquor distributing business was in a critical and transitional period. Competition was keen. It was a buyer's market. Prior to this time most distributors in this area had done business without any written contracts regarding duration or termination of their distributorships.

* * *

"During this period distillers were changing their distributors.

* * *

It was in this posture that discussions . . . began.

* * *

"Millett began to sell Park & Tilford products at each of their branches. Monthly depletion reports showing the amounts of each particular item sold were sent to Herting. This is normal procedure in the trade. Loviner and Herting discussed ways of making the depletion greater. *Millett ordered merchandise from Park & Tilford to fill up its supply of depleted items.*

* * *

"Secondly, and more important, contracts are often formed between business men of long experi-

ence in the trade and familiar with the relationship which they are undertaking, without explicit discussions of the details of promised performance. *The parties here expressly, in words, agreed that Millett was to undertake the 'distributorship'* of Park & Tilford Products within a specified area. They all understood from the discussions that the arrangement was not a single sale but that it was to continue. *The understanding in the trade as to what a distributorship encompasses, its economic function and business purpose, and the later actions of the parties in pursuing this relation before any disagreement arose are all entitled to great weight in determining their respective undertakings.*

* * *

"Park & Tilford's economic life is dependent upon the sale of its products. In this highly competitive business the wholesaler's function is a necessity.

* * *

"The further development of a market for Park & Tilford products was of the essence of the agreement. Not only is this the economic *sine qua non* of the distributorship relation but it was so understood in the trade. The acts of the parties were designed to further it. The depletion reports and discussions between the parties about them, the orders to fill the depletions, the dissemination of Park & Tilford's market policies to its distributors, the help given Millett by Herting and the sales representative, were directed toward this end.

* * *

"It is clear that Millett promised to do more than buy whatever amount of liquor it desired.

* * *

> *"Clearly implied was a convenant on the part of Park & Tilford to sell and upon the part of Millett to purchase and keep on hand a supply sufficient to meet the demand of this market.*
>
> * * *
>
> "The distributorship contract in the case at bar is more than a contract of employment or agency. It is also a contract of sale. On the other hand, it is more than a mere sales contract. It partakes of the substantial aspects of both.
>
> * * *
>
> "Park & Tilford's repudiation of the agreement was a substantial breach of the contract and Millett is entitled to damages."

In this practical background the instant contract was made and Calvert's breaches of three independent covenants of the contract occurred.

The first of these breaches was of the undertaking, on Calvert's part (par. 6, appendix)—

> ". . . to *promote the sales of its products* and to advertise its products in a manner consistent with the type of merchandise and the cases sold."

Industry usage, custom and common understanding is that "promotion" means (1) direct and individual selling activities by distillers "specialty" salesmen to induce offers to purchase by retail licensees and (2) submission of all offers to purchase so induced to the distiller's distributor in the area. Defendant's admissions and the testimony establish that such "promotion" was carried out by Calvert, in general, and with respect to plaintiff, also—until the summer of 1952.

The proof is that such promotional activities in support of plaintiff's functions as a Calvert distributor were discontinued during the last seven months of the original contract period and, further, Calvert violated the coterminous negative covenant, of refraining from depriving plaintiff of the benefits of the contract, by using such "promotional" personnel and activities to divert plaintiff's custom to the competing Calvert distributor, Julliard, by—"a trick of the trade. It's a way to emphasize one and de-emphasize the other."

The issue was fully presented and proved, and, with damages presumed and proof thereon reserved by approved stipulation, there was no means of avoiding a plaintiff's judgment upon the first cause of action.

The only pretended excuse for these conscious and systematic defaults is the assertion that such promotional activities as were undertaken by Calvert in its own contract violates some un-identified state law in some undisclosed manner to render the particular covenant, and the entire agreement, "illegal, null and void."

Reason miscarried and findings and judgment proceeded to non-suit, not only this severable undertaking —but the entire case as well!

To the contrary, the state act expressly exempted and authorized such promotional activities including "solicitating of orders for distilled spirits within the state" by "agents and employees of a distilled spirits manufacturer."

The official interpretation of the statutory exemption, the state licensing and enforcement agency, and

that of all other Courts to date, has been that the universal custom of the trade in the identical practice is lawful. Today and always, defendant and Calvert, along with all other such licensees, have solicited myriad such orders through large numbers of "specialty men" employed for no other purpose and who perform no other function.

No part of the record, nor any principle of state law or Federal procedure, can be marshalled to support—either the findings, or the rulings, below upon this subject matter.

Calvert's second breach was of the independent undertaking (par. 5 appendix) that it "agrees to supply its products to Distributor to the best of Calvert's ability," whereas, it is admitted that it refused to supply 900 cases, timely and properly ordered in accordance with the contract and admittedly during its minimum effective period. The express admissions to this cause of action, alone, compelled a plaintiff's judgment—unless defendant could plead and prove some lawful avoidance to its confession of this breach. This it did not do.

The only counterpoints proposed by defendant (other than the ubiquitous "illegality" claim) are that (1) the delivery of the 900 cases would result in an excessive inventory, which was not factually sustained, generally, and further omitted the essentials of (a) establishing the date of arrival and the extent of inventory upon date of anticipated arrival (b) assortment necessary to quantity purchases and (2) ignored the facts that (a) plaintiff had already exercised its

option to renew the contract and (b), in all events, had 46 days after the order within which to continue the resale of Calvert products.

No objective view of this record will permit any conclusion than that Calvert's refusal to fill this order was motivated by its purpose of depriving plaintiff of every right and benefit to accrue to it under the contract—further evidenced by its delicts in respect to its obligation to promote its products in plaintiff's behalf —systematically violated for some six and one-half months—and its subsequent repudiation of the renewal undertaking.

Again the judicial process short-circuited and the "finding" is contrary to the express admissions of defendant and to the uncontradicted evidence supporting recovery for this breach, i.e., the conclusionary negative pregnant "that it is untrue that Calvert . . . did not have a lawful reason for not shipping" (T40, "finding" VIII).

There is thus no finding whatever of any fact to evade the admissions and evidence on this cause of action.

If it could be assumed that the record could possibly be marshalled to support a finding, if made, adverse to plaintiff upon the purported "special defenses" to the second cause of action, those claims are nevertheless obviated by the fact of plaintiff's exercise of its option to continue the contract for the renewed period, wherein the duty to supply its products was a continuing and unfettered obligation of Calvert.

Calvert's third breach of the contract was its repudiation of the renewed contract for the succeeding period accomplished by plaintiff's exercise of its option to renew.

There is no possible dispute as to these issues, as factual issues, and the adverse judgment has proceeded upon an erroneous interpretation of the contract and in disregard of the plain wording of the renewal provision, of established rules of construction, and of the applicable rules of decision respecting the effect of the admissions and evidence pertinent to such interpretations.

The only "special defenses" are the repeated assertion that (1) Calvert and defendant are systematic law breakers and (2) an interpretative statement that the contract does not mean what it says.

In connection with the latter claim, it is noteworthy that the statement hinges upon a precise verbal misstatement of the wording of the renewal clause, itself, by the persistent substitution of the phrase *"apply for* said renewal" in the place of the actual wording of the contract, i.e., *"to renew the contract, he shall so notify Calvert"* (T25).

It should be further noted that the cause was tried and submitted upon *the crucial admission that the contract* (which Calvert drew) *was interpreted by plaintiff to mean that plaintiff did have the option to renew,* as set forth in the contract, *and it is nowhere suggested that such interpretation was an unreasonable one.*

Since all evidence relating to this subject was objected to by defendant, there is no basis for an adverse finding of *intention* (T41, "finding" XI), *contrary to the wording of the contract and such express admissions.*

The conclusionary "finding" (T41) and the conclusion (T42, No. III) are contrary to state law, and the judgment is thus without support.

Finally, plaintiff was deprived of a fair trial upon issues and evidence by the erroneous determination to dismiss upon defendant's contrived and inapplicable "illegality" theory, to which the findings were appliqued as a facade; it was a disservice to the Court and to the cause to "dispose of the case" (T140) without the required resolution of the issues actually presented.

II.

ARGUMENT AND AUTHORITIES, AS RELATED TO SPECIFIC ERRORS REQUIRING REVERSAL OF THE JUDGMENT.

A. THE JUDGMENT IS ERRONEOUS AND CONTRARY TO LAW IN DENYING RELIEF UPON EACH CAUSE OF ACTION SET FORTH IN THE COMPLAINT.

1. Plaintiff Alleged and Proved Defendant's Obligation to Promote Its Products and the Breach of That Obligation Under the First Cause of Action.

It would seem incontestible that Calvert expressly bound itself by the agreement to "promote its products" as contemplated by the contract.

a. The Obligation "To Promote" Defined.

Calvert did not choose to define its obligation "to promote" in the contract and the scope and meaning of that expression must be spelled out by evidence *de hors* and by the integrated custom of the industry as recorded in *Park & Tilford,* supra (123 F.S. 484, 488, as above quoted), i.e.,

> "As is normal in the industry, this sales representative called upon retailers to solicit orders for [defendant's] distributors."

Evidence of usage and custom as an aid to interpretation is made admissible by Section 1870 of the California Code of Civil Procedure, which provides, in part:

> "In conformity with the preceding provisions, evidence may be given . . .
>
> * * *
>
> "12. Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible, except as an instrument of interpretation";

The California rule of decision relative to this question is summarized in the recent case of

> *Guipre v. Kurt Hitke & Co.,* supra (109 C.A. (2d) 7, 14, 240 P. (2d) 312);

as follows:

> ". . . When there is a known usage of trade, persons carrying on that trade are deemed to have contracted in reference to the usage, unless the contrary appears; and *the usage forms a part of*

the contract. Evidence of usage is always admissible to supply a deficiency or as a means of interpretation where it does not alter or vary the terms of the contract (*Watson Land Co. v. Rio Grande Oil Co.,* 61 Cal. App. 2d, 269, 272 [142 P. 2d, 950])."

It is further the rule of decision in California that a contract is presumed to have been made in contemplation with industry customs of the locality of performance and that such custom need not be alleged, summarized in—

Covely v. C.A.B. Construction Co., supra (110 C.A. (2d) 30, 33, 242 P. (2d) 87 (Hearing Supreme Court, denied).

"(1) A contract may be interpreted in accordance with the usage of the place of its performance (Code Civ. Proc., sec. 1870, subsec. 12);

"(2) Knowledge of the custom on the part of the contracting parties is presumed from the fact that they are in the business or trade in which the custom exists (*Watson Land Co. v. Rio Grande Oil Co.,* 61 Cal. App. 2d 269, 272 [42 P. 2d 950]; *Hind v. Oriental Products Co.,* 195 Cal. 655, 667 [235 P. 438]).

"(3) It is not necessary to plead a custom or usage where it is so general that it is presumed to have been known by the parties to a contract (*Todd v. Meserve,* 93 Cal. App. 370, 381 [269 P. 710]).

"Applying the foregoing rules to the facts in the present case the evidence which was admitted was of a general custom and usage in the trade. There-

fore it was properly admitted for the purpose of determining the extent and control of the lessee over the operator of the equipment leased upon a wholly equipped 'operated and maintained' basis."

In

Brogdex Co. v. Walcott, 123 C.A. (2d) 575, 581, 267 P. (2d) 28 (Hearing Supreme Court, denied),

the Court was concerned with a precisely comparable factual situation with respect to the distribution of a patented wax process used in fresh fruit marketing.

In upholding a declaratory judgment and orders requiring an accounting, the Court stated the California substantive rules to be here applied as follows (p. 581):

"And, as stated by this Court in *Brawley v. Crosby, etc. Foundation, Inc.,* 73 Cal. App. 2d 103, 112 [166 P. 2d 392]: 'In this, as in every contract, *there is the implied covenant of good faith and fair dealing: that neither party will do anything that would result in injuring or destroying the right of the other to enjoy the fruits of the agreement* (Citation of authorities). *The law will therefore imply* that under its agreement appellant was obligated in good faith and by its *reasonable and best efforts to develop, exploit, produce and make sales* of the rotary pump in question.' See also *Matzen v. Horwitz,* 102 Cal. App. 2d 884, 892 [228 P. 2d 841].

". . . Therefore, when appellant Cunning became an employee of Johnson *in work antagonistic to and in competition with that of respondent, he breached the implied obligation of the agreement*

to deal fairly and in good faith with respondent, thereby justifying its termination."

In the recent case of

Kennerson v. Salih Bros., 123 C.A. (2d) 371, 373, 266 P. (2d) 871,

the Court was confronted with the same problem of determining the true intent of the parties *in using "promotion" in a written contract* for the "promotion" of corporate stock. The identical contention of the instant defendant was there summarized by the Court as follows:

"Plaintiff *claims it was a violation of the parol evidence rule to admit extrinsic evidence concerning the 'services* which you [plaintiff] rendered in the *promotion* . . .' of the corporations mentioned. He says this letter, signed by the parties is a writing which integrated and expressed the agreed terms, conditions and covenants of the contract and superseded the antecedent oral negotiations, discussions and understandings of the parties. . . ."

In affirming the judgment supported by a finding based on "extrinsic evidence" received upon overruling such objection, the Court summarizes the California rule, namely (p. 373):

"What did the parties mean by the expression 'services which you rendered in the *promotion'* of the two corporations? *That language is not clear and explicit.* The words 'services' *and 'promotion,' in that context, have no definite and certain meaning.* The parties differ as to the meaning. *A court cannot resolve the conflict without the aid of ex-*

trinsic evidence. This situation is like that which obtained in *Wachs v. Wachs,* 11 Cal. 2d 322, 325-326 [79 P. 2d 1085], where the like use of extrinsic evidence was sanctioned."

In a most recent reexamination of the same contention, i.e.—

> "It is argued that this contract is unambiguous and contains no such provisions, and that under the parol evidence rule evidence was not admissible for the purpose of adding a provision which was not even mentioned in the agreement."

in the case of

> *Alder v. Campbell,* 126 C.A. (2d) 421, 424, 425, 272 P. (2d) 115 (Hearing Supreme Court, denied),

the Court stated the California rule applicable to that contention as follows:

> ". . . the contract is entirely silent with respect to what should happen in the event no such building operations should be carried on. In this situation *the court admitted evidence with respect to the intention of the parties in this regard,* at the time the contract was entered into. The evidence received in that connection amply supports the findings complained of. *That evidence was not admitted to vary the terms of a written contract and did not serve that purpose. It was admitted for the purpose of determining the true intent of the parties with respect to a matter on which the contract is entirely silent.* Under well established rules, that evidence was admissible (Citation of authorities). This evidence, with the contract itself, supports the findings made."

It is thus too patent to justify further citation that the intendment of the undefined words "promote" and "sales promotion," as expressly undertaken by Calvert in support of plaintiff's distributorship, is that alleged in the first count of plaintiff's complaint and established by the uniform custom of the trade as judicially determined (123 F.S. 484, 488) *and the testimony received in this cause.*

Procedurally, it was manifestly erroneous for the Court below to ignore this evidence and this custom and grant defendant's motion, *sub nomine* findings and judgment, in defiance of the judicial policy repeatedly declared by the Supreme Court and succinctly reiterated, in reversing a summary judgment interpreting a contract, in the case of

Kennedy v. Silas Mason Company, 334 U.S. 249, 255, 257, 92 L. ed. 1347, 1350, 1351;

namely:

> ". . . There is substantial controversy as to the way those two parties, the Government and defendant in actual practice, construed their contracts, both sides of the controversy being based on events of which we are asked to take judicial notice or *to spell out from contracts without the tests which trial affords.* . . .
>
> * * *
>
> ". . . While we might be able, on the present record to reach a conclusion that would decide the case, *it might well be found later to be lacking* in the thoroughness that should precede judgment of this importance and *which it is the purpose of the judicial process to provide.*"

It is respectfully submitted that this record requires findings and judgment that Calvert's obligation was to furnish and carry out services described by witness Lewis in his testimony and the custom of the trade at the place and time set forth in the first cause of action, and this obligation was violated by Calvert, by withdrawal of such promotion and service in plaintiff's behalf; and, in addition, breached the negative obligation[8] not to use these efforts to frustrate plaintiff's additional sales to the retail outlets; and for these reasons the judgment must be reversed for a new trial upon the issues presented by the first cause of action.

b. Defendant's Pretended Special Defense of "Illegality" Is Not Sustained or sustainable.

This claim violates every rule of decision to be found in the reported cases.

First, no such claim was procedurally reserved or factually supported and these questions may be passed until defendant has advanced some rehabilitation of its presentation and the judgment obtained by such means.

Secondly, and of controlling importance, the claim is non-existent because the precise practice of "soliciting orders", on which alone the claim is bottomed, is

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[8]These obligations are also imposed by state common law and by state and Federal statutes proscribing discriminatory treatment of trade buyers similarly situated, and other acts of unfair competition.

Buxbom v. Smith, 23 Cal. (2d) 535, 540, 541, 548, 145 P. (2d) 305;

Callman, Unfair Competition and Trade Marks, Sec. 33, pp. 587-588 and cases cited (2nd ed.), 1 P. (2d) 140.

specifically exempted from all restrictions by the express exemption of the licensing statute itself (section 23,773, above quoted) which declares that the statutory license restrictions "do not prevent . . . soliciting orders"!

The official interpretation of the latter exemption for such "soliciting of orders" is that the exemption means what its plain language declares.

The licensing agency (State Board of Equalization Order 129 a, January 10, 1940) interpreted this exemption for such soliciting of orders, in part as follows:

> "Persons who are the holders of distilled spirits manufacturers' agents' licenses may have *promotional* representatives call upon the retail trade. They may not, *however,* receive *signed* orders for distilled spirits from the retail trade.
>
> "There has been some confusion in regard to this problem for the reason that Section 23773 of the act provides that this provision shall not be deemed to prevent agents or employees of distilled spirits manufacturers located outside this State from soliciting orders for distilled spirits within the State. . . ." (Official emphasis.)
>
> (Liquor Control Law Service, Commerce Clearing House, California, par. 2101, Note 55.)

In the *Park & Tilford* case, supra, (123 F.S. 484, 496) the Court expressly declared that such solicitation was not unlawful, as an act of unfair competition, and denied relief as to claims based upon the instant claim of this defendant.

In the recent case of

Alpha Distributing Co. v. Jas. Barclay & Co., 215 F. (2d) 510,

this Court affirmed the denial of injunctive relief sought upon the instant defendant's claim of "illegality".

The same ruling was made on the same claim by the Court below in the *Park & Tilford* case and the case of

Better Brands v. The Fleischman Distillery Co. (District Court Number 31,811, Civil).

Defendant failed to cite to the Court below a single precedent, even *nisi prius,* for its specious "interpretation" of the act and plaintiff has discovered none. The express exemption of such soliciting of such orders from such other provisions of the act as might have impinged upon that license privilege was a matter exclusively within the police power of the state and the legislative jurisdiction of its law-making body. That legislative power has functioned and that ends the argument.

The Court below was required to accept the state law upon this subject matter, a mere distribution of license privileges.

See the leading case of

Colgate-Palmolive-Peet Co. v. National L.R. Bd., 338 U.S. 355, 361, 363; 94 L. ed. 161, 168, 169

in part,

". . . We therefore also look to the law of the state where the closed-shop contract was made,

here in California, to determine its validity. We think it is clear, and do not understand the Board to contend otherwise, that the closed-shop *contract was valid under California law.*

* * *

". . . The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. . . ."

No judgment should adopt the unprecedented and unsupported *ipse dixit* of a contesting litigant, certainly not one that flies in the face of an express statutory declaration of legislative policy precisely to the contrary—as this judgment does.

Moreover, defendant is in no position to raise any point of "illegality" with respect to this subject matter.

See the case of

Hill v. The Progress Co., 79 Cal. App. (2d) 771, 779, 180 P. (2d) 956

in part,

"The shipper defendants herein are hardly in a position to challenge the right of plaintiff to enforce his claimed contract upon the ground that he is a 'highway contract carrier' without the requisite permit, when they not only expressly deny the existence of any contract that could be the basis of this class of carrier *but by their own conduct in hiring numerous other truckers* to haul the merchandise claimed to be covered by the private contract have violated and disregarded its terms, with the acquiescence and sufferance of the

carrier, *and under the construction of the act above quoted, thereby conceded that plaintiff was not a contract highway carrier.* Under these conditions *we are unable to agree that plaintiff is prevented from maintaining his action because of any illegality of his contract.*"

This defendant is in precisely the same position as the unsuccessful plaintiff in the leading case of

Partmar Corp. v. Paramount Theatres Corp., 347 U.S. 89, 95, 98; 98 L. ed. 532, 539, 541, 74 S. Ct. 414

wherein illegality had been conclusively shown, but the claim of illegality of the contract was rejected when asserted as a means of aggrand izement to one of the guilty party who sought, in the immediate case, to avoid its contract.

The ruling, in part, was:

". . . the case went to trial without amendment of the pleadings . . . on two issues: whether Paramount was justified in terminating the franchise agreement because of the decree in the New York Paramount case, supra; whether the lease and contract were illegal contracts under the federal antitrust statutes justifying repossession of the theatre by Paramount under California law. See e.g. *Glos v. McBride,* 47 Cal. App. 688, 191 P. 67. Thus issue was joined as to the legality of the actions of Paramount and its alleged co-conspirators relative to the lease and franchise agreement, wholly apart from the New York injunction, and *Paramount was in the anomalous position of attempting to prove that its agreements with Partmar violated the antitrust laws.* Paramount did

not limit its contention of illegality of the agreement to nonconspiratorial aspects of the antitrust laws but argues that if the agreements were illegal in any way it had the right to possession. . . ."

* * *

"The court simultaneously entered an order giving judgment for Partmar on Paramount's two counts of unlawful detainer. . . .

* * *

". . . *declaring the lease and franchise to be valid and subsisting and the theatre not to be unlawfully detained.* Therefore those parts of the judgment must be accepted as valid and binding on the parties. . . ."

Calvert expressly undertook to promote its products and it is proved that it consciously refused to do so, at all times after June of 1952.

We are unable to discern any means of avoiding a holding in plaintiff's favor on this issue of liability.

It is respectfully submitted that the instant judgment is contrary to controlling substantive law and must be reversed.

2. Calvert's Obligation to Supply Its Products to Plaintiff and Its Failure to Deliver the 900 Case Order, Are Alleged, Proved and Admitted.

There is no possible defect in plaintiff's case upon the second cause of action and the only conceivable support for this portion of the judgment, i.e., the pleading and proof of some tenable excuse for the admitted breach of the obligation to supply Calvert products in accordance with the order for 900 cases

(plaintiff's Exhibit 2), admitted to have been delivered "while the contract was in effect" and "pursuant to and in accordance with the terms thereof."

By way of purported "special" defenses (T19-22) defendant designates four claims of a purportedly factual nature.

(a) The first of these claims (second defense) is that Calvert's failure to deliver the 900 cases ordered would have resulted in "an excessive inventory", as described in paragraph 5 of the contract (Appendix).

But there is no averment of any facts to invoke the reservation and *it is not averred that Calvert exercised such right nor that the order was rejected for any such reason.*

The burden of proving this asserted defense was upon defendant and there is no finding of facts to support a holding that it could be sustained.

Fatal to the claim, however, is the absence of any proof (detailed in the statement of the case) to support any finding of "excessive inventory" at the time the order was to be received—because defendant offered no evidence of any kind.

(b) The second of these claims is "that it would have been an idle act . . . to ship because . . . [plaintiff] would have been obligated to return said merchandise."

(c) The next claim is the anomalous argument that Calvert's contract and conduct, in soliciting retailers to purchase Calvert and Carstairs products from Calvert distributors, was criminal—which neces-

sarily implies that defendant may resist plaintiff's lawful claim to damages by asserting Calvert's independent and voluntary misconduct, notwithstanding the maxim that—

> "no one can take advantage of his own wrong."
> (Section 3517 of the Civil Code of California).

(d) The concluding (fourth) claim of this nature is that defendant has a "partial defense" to plaintiff's second "alleged cause of action and in mitigation of damages" in that Calvert received and credited the return of the odd-lot and broken-line remnants of plaintiff's Calvert-Carstairs inventory.

It is not apparent how such claim could constitute a defense—"partial", or entire; and it is plaintiff who is entitled to credit for thus mitigating damages.

Factually, defendant presented no evidence on this subject matter; the answers to interrogatories, if otherwise adequate, omit essential elements of proof necessary to support any affirmative finding upon any such special defense; and, specifically, plaintiff reserved all sub-issues and inferences relative to such answers to interrogatories (T52, 94, 96, 99, 100) in part (T99, 100);

> "Mr. Hutchinson: . . . However, these inventory records, as I understand it, *would be shown to relate to the first of the month and not to the 15th, and for that reason we would object* to this particular information on the ground that it is incompetent, irrelevant and immaterial, *and too remote to the time when the order of December 15, 1952, was placed and the time when it would*

have arrived, the inventory would be different, and that this does not show that."

* * *

"In order to save you time, . . . we will stipulate . . . subject to our objection that there is no issue presented that the order was rejected nor any averment that the order was rejected for that reason."

Patently, statistics[9]—whatever their effect otherwise—are neither "self-executing", nor self-explanatory, and require some foundational showing to prove anything.

Though having the burden of proof and of going forward upon these affirmative issues, none of such "special defenses" were established by defendant.

Section 1981 of the Code of Civil Procedure provides:

"*The party holding the affirmative of the issue must produce the evidence to prove it;* therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side."

See also

Ozmo Oil Co. v. Cotton & Co., 278 F. 100;

Johnson Trade Co. v. Frimmersdorf, 100 Cal. App. (2d) 719, 224 P. (2d) 771;

Sevier v. Roberts, 52 Cal. App. (2d) 403, 126 P. (2d) 380.

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[9]It is clearly presumed—

"That *higher evidence would be adverse* from inferior being produced." (Code of Civil Procedure, Sec. 1963, subdiv. 6; *Hann v. Venetian Blind Co.,* 111 Fed. 455.)

However, it is specious to pursue these details because defendant did not act upon any such excuse, *in pais,* or in the presentation[10] below—and these issues were not resolved below, but blanketed in with the even more specious claim of "illegality".

The most casual examination of this record discloses Calvert did not refuse to supply the 900 cases for any reason or justification—but only to force plaintiff out of Calvert distribution, forecast by the breach of the obligations related to the promotion undertaking above analyzed and culminating in the repudiation of the renewal provision hereinafter considered.

This was made clear by the premature repudiation attempted almost two months earlier (notice of exercise of option to renew plaintiff's Exhibit 3) in part:

> "We are not overlooking the fact that on October 30th, 1952 *your executive vice-president, Mr. Tubie Resnik, stated that it was 'extremely doubtful' that you shall renew that contract, but under the contract as made the choice of renewal is ours and we choose to exercise it."*

Plaintiff's right to recover upon this breach of the contract for refusal to deliver products ordered during the admitted contract term (sections 1761,

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[10]The submission (T137) was:

"The first motion is to dismiss the complaint and *the three counts on the ground that the contract which they have pleaded in their complaint is illegal* and void and violative of the Constitution, the public policy and the Alcoholic Beverage Act."

1763(2), 1786, 1787 and 1796 of the Civil Code) is clear.

Ross v. Frank H. Dunne Co., 119 Cal. App. (2d) 690;

Walpole v. Prefab Mfg. Co., 103 Cal. App. (2d) 472, 260 P. (2d) 104;

Muraka v. Bachrack Bros., 215 F. (2d) 547, 554;

Packard etc. Motors v. Packard etc. Co., 215 F. (2d) 503, 507.

3. The Contract Contained an Irrevocable Offer, or Option, to Renew the Contract Upon Plaintiff's Election and Notice, as Therein Provided, Which Was Accepted by Plaintiff and Unlawfully Repudiated by Calvert.

It seems apparent that this element of the case depends upon the resolution of questions of law, alone; the facts are that the contract contained a provision for renewal, which is *admitted to have been interpreted by plaintiff as conferring upon it the right to a renewal* by the giving of the notice therein described; *it is admitted that the notice was given and was timely* (plaintiff's exhibit 3, November 18, 1952); and it is *admitted that the contract created by the acceptance of the offer was not carried out by Calvert.*

It is conceded that Calvert prepared the contract, in a printed form for insertion of identities, dates and other details relative to the situation of each of its distributors, and *it is not found, concluded or claimed that the admitted construction of the contract by plaintiff—as giving it the right of election, or option, to renew—was unreasonable!*

These considerations invoke the universal rules of decision that—

> "In case of doubt the court will, in proper cases, follow the construction placed upon the contract by the parties and likewise, in case of doubt, *the Court will construe the words of the contract most strongly against the party who used them in the preparation of the contract.*"
>
> (*James on Option Contracts,* Sec. 122, p. 56);

and

> "So also, if an offeror says what he does not mean, in terms and under circumstances that do not apprise the offeree of the discrepancy between intention and expression, *a contract comprising the terms as expressed results from an acceptance. The offeror must stand by what he said, and cannot insist on what he meant, no matter how clearly he can prove the latter.*"
>
> (27 Harvard Law Review 644, 645, Irrevocable Offers, D. O. McGovney).

This principle has been codified in sections 1580 and 1654 of the Civil Code.

The renewal provision of the contract must be construed as having been intended to mean something and that something is to be determined in the light of

> "*The understanding of the ordinary person* * * * the standard which must be used in construing the contract * * *"
>
> *Ransom v. Penn Mutual etc. Co.,* 43 Cal. (2d) 420, 425, 117 P. (2d) 951.

The renewal provision (paragraph 11) reads as follows:

> "11. * * * *If Distributor [plaintiff] desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952."*

The alternative obligation upon plaintiff, in the event it did not elect to renew the contract, is stated as follows:

> "12. In the event that this contract is *not renewed,* Distributor * * * *will return*[11] to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory."

The recitals of facts in contemplation of the parties at the time of making the contract include the following (p. 1, Appendix 1):

> "Whereas, Distributor *desires* to act as a distributor of alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., in the State of California."

The operation of the renewal provision is not clogged by any procedural device, beyond notification; nor by any provision for negotiation between the parties, "consideration", notice, acceptance, or any other response or action by Calvert in reply to plaintiff's notice, or any further requirement of action, notice, recordation or other means of accomplishing or establishing the fact of renewal.

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[11]The profitless "return" of property owned and purchased for resale is certainly akin to—perhaps literally—a forfeiture, thus invoking the further rule of construction:

> "It is a general and well recognized rule that provisions of a contract will be construed, if possible, to avoid a forfeiture." *Wagner v. Shapona,* 123 Cal. App. (2d) 451, 461, 19 P. (2d) 514.

No further action or communication of any nature, in fact, obtained until the argumentative communication of January 26, 1953 (Plaintiff's Exhibit 4) of defendant's house attorney, some 69 days after the notice invoking the renewal provision had been given.

Each of the terms and conditions of the contract, as renewed, were settled and established, by the contract itself, and required no further action by any party.

> *Warner Bros. Pictures v. Brodel,* infra, (31 C. (2d) 766, 773).

Calvert still retained its privileges of fixing all prices, both of sale and resale (paragraphs 3 and 10), credit and shipping terms (paragraph 4), reservations respecting available supplies (paragraph 5), unilateral termination upon (1) change in ownership and management of plaintiff (paragraph 14), (2) upon plaintiff's undertaking distribution of competitive products (paragraph 9), etc.

By contrast, plaintiff had no reserved right to terminate the renewed contract, by any means, and was continually bound to maintain its reputation, license, sales force, inventory, to devote not less than 23% of its effort and money to Calvert's products, and to refrain from undertaking competitive distribution (paragraphs 7, 8, 2, and 9).

Even in the absence of an express provision for renewal, a leading authority has stated the rule with respect to such distributorship contracts—

> "The agreement fairly interpreted gives the agent or distributor *an enforceable option to hold*

> *the manufacturer* for a fixed or reasonable time while remaining free himself to terminate the relation at will."
>
> *Williston,* supra, Sec. 1027A,

relying largely upon the decision of this Court in the case of

> *Kelly-Springfield Tire Co. v. Bobo,* 4 F. (2d) 71; (certiorari denied, 268 U.S. 694)

so construing a distributorship contract controlled by California substantive law.

The instant contract was printed and delivered to plaintiff by defendant, rather than negotiated, and as Mr. Williston has pertinently observed (Section 1027A, supra)—

> "* * * *Nor must it be overlooked that these elaborate instruments are almost invariably drawn by or on behalf of the manufacturer and presented to the dealer simply for his signature on the dotted line.* The very fact that so frequently this carefully drawn instrument leaves the question of its termination, *'an obligation incompletely expressed,'* and the startling disproportionate burden otherwise cast upon the dealer should here, as in the requirement and output contracts, justify the courts in inferring an intention to bind both parties for at least such time as may be required to demonstrate the cause * * *"

The California rule of decision upon continuing and irrevocable offers to contract is summarized in

> 12 Cal. Jur (2d) 204, Sec. 15 Contracts, continuing offer,

as follows:

"A continuing offer is a proposal made to be accepted within a specific time. A common example of such a continuing offer is an option. In an option contract the optioner stipulates that for a reasonable period he waives the right to revoke the offer. * * * If the optionee does comply, he has rights that he * * * may enforce. *Such election gives rise to a subsequent contract between the parties to perform whatever other acts have been specified in the option contract, and the optionor, or person making the offer, becomes obligated to perform.* * * *"

The California rule of decision respecting continuing and irrevocable offers is that no action by the offeror is required, but that the offeror becomes bound to perform the contract to which the offer relates upon upon its acceptance by the offeree.

In the leading case of

Warner Bros. Pictures v. Brodel, supra, (31 C. (2d) 766, 773), 192 P. (2d) 949),

these principles are succinctly stated as follows:

"* * * The creation of the final contract requires no promise or other action by the optionor, for the contract is completed by the acceptance of the irrevocable offer of the optionor by the optionee. *'The contract has already been made,* as far as the optionor is concerned, but is subject to conditions which are removed by the acceptance.' * * * *Thus the option contract gives the optionee a right against the optionor for performance of the contract to which the option relates* upon the exercise of the option, *which the optionor cannot defeat by repudiating the*

option. (See McGovney, Irrevocable Offers, 27 Harv. L. Rev. 644, 646, 654, and cases collected in footnote 5, p. 646; Corbin, *Option Contracts,* 23 Yale L. J. 641, 656.) Since the optionor promises to perform the contract to which the option relates, subject to *a condition at the discretion of the optionee,* an option contract involves on the part of the optionor *a unilateral promise to perform the obligations of the contract to which the option relates.* * * *"

The instant offer to renew was continuing until 30 days prior to December 31, 1952, and the consideration for continuing that offer was more than ample. The correlative penalty provision of paragraph 12, for a profitless return of the remaining inventory, forced plaintiff to an election and it elected to give notice of renewal and to continue the distributorship.

It cannot be disputed that a contract may be made renewable by its own terms, at the election of one of the parties thereto, and that, in the event of such renewal, the rights and obligations of all parties are continued without change during the new period.

This principle was early adopted in California.

See

Kleinsorge v. Kleinsorge, 133 C. 412, 65 P. 876, and cases cited, wherein it was held (pp. 414-415) namely:

"* * * It is conceded by appellant that it was competent for the parties *to provide for a renewal of the note by its own terms* * * * A fair

> construction of the note is, that, *if renewed,* it shall, as to the makers, run for the full year,—i.e., that they shall not have the right to pay it sooner, unless consented to by the holder; *but the renewal also renewed the promise to pay interest monthly, and also renewed the option to the holder to treat the whole note as due if interest was not so paid.* But for this provision of the note the renewal for a year would support appellant's contention; *with the provision the renewed note stood on the same footing as in the first or any subsequent year, and the option to treat it as due and payable on default* in payment of interest was available to the holder."

See also,

Bergen v. Van Der Steen, 107 C.A. (2d) 8, 236 P. (2d) 613 (Hearing Supreme Court, denied)

and cases cited.

The parties to the instant contract did provide for the renewal of that contract "by its own terms". There is no term, condition or undertaking of the instant contract which could not be accomplished during the renewal period as readily as in the original period.

As in all such cases, only two elements of an effective renewal provision are essential, i.e., (1) designation of the party to the contract who may invoke the renewal provision and (2) provision of a means of invoking the renewal provision.

The instant renewal provision sets forth each of these essential elements: (1) it is the distributor who

may renew the contract, if he desires; and (2) the means of accomplishing the renewal is by the distributor's notifying "Calvert not less than 30 days before December 31st, 1952" (paragraph 11).

This effect of the renewal provision is further supported by the alternative obligation of the penalty clause for the profitless resale of the remaining inventory set out in paragraph 12. Not only was plaintiff designated as the only party to elect, he was required to elect—one way or the other.

Since each of the terms of the contract was dictated by defendant and plaintiff's performance during the renewal period was to be greatly beneficial to defendant in its only business objective of distribution, there was no room for negotiation and no detriment to defendant to be avoided by reservation of some unstated power of rejection.

It must be recalled that contractual provisions of this nature are common in business usage and more frequently prepared by business men than attorneys—as the instant provision appears to have been.

See,

67 C.J.S. 511, Options,

where this observation is made:

> "The word 'option' *is a term of business usage rather than of strictly legal nomenclature,* and has frequently been *used to include indiscriminately* conditional sales contracts and mere unsealed offers without consideration, as stated in section 100 on Contracts. *However, the very meaning of the word 'option' implies a right to*

> *act or not to act as the optionee may choose,* and in this sense the word has been variously defined as *meaning the right of choice, the right of election, to exercise a privilege, etc., etc.*"

There remains, then, only the interpretation of the specific wording of the renewal clause, which turns upon the reasonable intendments of the two crucial phrases of the renewal clause, namely: (a) "if distributor desires to renew" and (b) "he shall so notify Calvert".

a. Offers, Including Continuing and Irrevocable Offers, Are Necessarily Made to the Desire, Pleasure, Wish, Election, Choice and the Like, of the Offeree.

We suppose it will not be contested that the very nature of offers and proposals—whether revocable or irrevocable—are always, necessarily, and inevitably, addressed to the desire, wish, election, choice, and the like, of the offeree. In all events, the universality of the rule of decision to that effect is such that it would be trite to extend this memorandum with citation of authority to establish that the offer is always so addressed to the offeree.

It is equally established that continuing and irrevocable offers (options) are similarly addressed.

The most recent California decision on the immediate point is that of

> *Caras v. Parker,* 149 A.C.A. 712, 717, 309 P. (2d) 104

in part,

"* * * Or, stated in another form, it is a right 'acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future. (21 Am. & Eng. Ency. of Law, p. 924.) When the offer thus made is within the time stipulated, accepted by any sufficient act or words of the party acquiring the right to accept or reject such offer, the transaction between the parties, *ipso facto,* ceases to be an option, but becomes a sale or contract of sale according to the circumstances of the acceptance.'

An option founded upon a valuable consideration cannot be withdrawn or revoked within the time fixed, and it will be binding and obligatory upon the optioner, or his assigns with notice, until it expires by its own limitation. * * *"

For examples of rulings of the state courts upholding "desire options", see the following:

Dawson v. Goff, 43 Cal. (2d) 310, 315, 273 P. (2d) 1;

Flickinger v. Hecht, 187 Cal. 111, 115, 200 P. 1045;

Flagg v. Andrew Williams Stores, 127 Cal. App. (2d) 165, 176, 177, 273 P. (2d) 294;

Wagner v. Shapona, supra (123 Cal. App. (2d) 451, 455), 19 P. (2d) 514;

Achen v. Pepsi-Cola, etc., Co., 105 Cal. App. (2d) 113, 117, 233 P. (2d) 74.

For examples of similar decision in other states enforcing options addressed such "desire", "wish", "election" and the like of the offeree, see the following:

DESIRE.

The effectiveness of an option expressed in terms of desire is adequately demonstrated by the many cases in which such provisions have been upheld and enforced.

As examples, see the following:

Congregation etc. v. Gerbert, 57 N.J.L. 395, 31 Atl. 383:

"* * * said party of the second part that he will let and demise to them the premises hereby demised for a further term of five years * * * and upon the same terms as to amount and payment of rent, in the said party of the second part shall so *desire* and shall give notice hereof at least three months before the expiration of this lease; and further, that if the said party of the second part shall *desire* to purchase the demised premises, that he will at any time during the tenancy * * * sell and convey * * * the demised premises to the said party of the second party, or such person or persons as they shall desire, upon their giving to him * * * notice that they *desire* such conveyance; * * *"

Anderson v. Bills, 335 Ill. 524, 167 N.E. 864:

"Now, therefore, in consideration of the premises * * * A hereby agrees to purchase from B the above described land for ——— dollars at any time within five years from this date, *provided notice is given* by B to A on or before September 1st of any year *that B desires A to take said lands.*[12] * * *"

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[12]Set forth as in approved form in
Nichols Cyclopedia of Legal Forms, Annotated, Vol. 7, Section 7.496.

Echternach v. Moncrief, 94 Kan. 754, 147 P. 860:

"* * * It is my *desire* that you purchase * * * 30 shares of stock * * * according to the terms of a certain contract * * * By the terms of this contract you have agreed to purchase this stock four years after its issue if I *desired* to sell."

Brooks v. Trustee Co., 76 Wash. 589, 136 P. 1152:

"* * * we hereby agree that after you have consulted your sister or any one else in regard to this investment you *desire* to withdraw your investment you may at any time return these bonds * * *";

In re Lindsay's Estate, 210 Pa. 224, 59 Atl. 1074:

"* * * it is agreed that those of the present stockholders, * * * shall have the option to purchase and acquire the whole of the stock interest of such party so dying or so *desiring* to sell his said interest * * *";

Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 149 N. W. 754:

"If at any time any of the original stockholder subscribers hereto *desire* to sell and dispose of their stock, said stockholder or stockholders shall first offer it in writing to the board of directors, stating price and terms and give the board of directors ten days in which to place it with the stockholders. * * *";

McFarland v. McCormick, 114 Iowa 368, 86 N. W. 369:

"* * * I hereby agree that, in case you fail to dispose of said lots on or before August 15th, 1896, that I will on that date pay to you * * * provided, you *notify* me that you *desire* me so to do ninety (90) days prior to August 15, * * *";

Carter v. Love, 206 Ill. 310, 69 N. E. 85:

"* * * Now, if the said M. G. Love shall at any time before the expiration of this option so *desire,* I agree, in consideration of the sum of $9,240 to convey to said M. G. Love, or as he shall direct, * * *";

In re Wallbridge, 198 N. Y. 234, 91 N. E. 590: "If any of the residuary legatees *desire to purchase* any of the personal property or real estate owned by me they may do so at its current market price * * * and the same shall be charged against their respective shares or interest as money paid to them by the executors * * *"

ELECTION

Bras v. Sheffield, 49 Kan. 702, 31 P. 306, 33 A.S.R. 386;

Brush v. Beecher, et al., 110 Mich. 597, 68 N. W. 421;

Darling v. Hoban, 83 Mich. 599, 19 N. W. 545.

REQUEST

Beaden v. Bransford, 144 Tenn. 395, 232 S. W. 958.

PRIVILEGE

York County Sav. Bank v. Abbot, 131 Fed. 980, 139 Fed. 988.

DECIDE

Comstock Bros. v. North, 88 Miss. 754, 41 So. 374.

DETERMINATION

Consolidated Coal Co. v. Findley, 128 Iowa 696, 105 N. W. 206.

DEMAND

In the most recent California case to come to our attention,

Dawson v. Goff, supra, (43 A. C. 311, 314, 273 P. (2d) 1),

the option was expressed in the form of a demand—

"* * * hereby agree to purchase from you * * * upon *demand* written or verbal * * * not to exexceed forty thousand (40,000) common shares * * *

"This agreement terminates if no demand is made on February 28, 1953."

The Court interpreted the contract as follows (p. 316):

"Assuming the February 28th, 1950, instrument did not constitute a binding contract for the sale of the stock because it was lacking in mutual consent and consideration in that plaintiffs did not promise to sell any stock or any number of shares to defendants, *yet it could constitute an offer by*

the buyers (defendants) *to buy such number of shares,* not exceeding the stated amount, *as the sellers* (plaintiffs) *desired to sell.* * * *"

The Court concluded that evidence (p. 319) to the extent admissible "may be admissible to throw light on the basis of liability".

See, also,

Solomon Mier Co. v. Hadden, 148 Mich. 488, 111 N. W. 1040, 118 A. S. R. 586.

The foregoing examples should be adequate to demonstrate that in law, as well as in business practice, offers, irrevocable offers, options and similar contractural rights may be expressed in terms of desire. Whenever a party to an instrument has the right, privilege or power to invoke a renewal or other provision therein, the determination must necessarily be a subjective reaction and any words recognizing this power of decision will suffice.

It is obvious that the terms of acceptance need not, and generally do not, require more than a provision for conveying notice to the offeror by the offeree of the fact of acceptance and nothing more was required here.

See,

Warner Bros. Pictures v. Brodel, supra, (31 C. (2d) 766, 773);

Dawson v. Goff, supra, (43 A. C. 311, 318).

The cardinal rule that distributorship contracts are to be given a practical, straightforward business in-

terpretation to accomplish the purposes thereof has been expounded by our ablest jurists.

Mr. Chief Justice Holmes stated for the Court in

Martin v. Meles, 179 Mass. 114, 60 N. E. 397, 398,

that—

"there is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted."

Mr. Justice Cardozo, in speaking for the Court in enforcing such a contract in

Wood v. Lady Duff-Gordon, 222 N. Y. 88, 118 N. E. 214,

stated that—

"* * * The law has outgrown its primitive state of formalism where the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today. *A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed* (citations). If that is so, there is a contract."

In

Merchants Life Ins. Co. v. Griswold, 212 S. W. 807 (Tex. Civ. App.),

the Court stated:

"If the contract should be held to be terminable at the *option of Griswold, the time and money expended by him in establishing agencies, the same being in contemplation of the parties when the*

contract was made, constitutes a valid consideration for such option."

In enforcing another such contract, the Court in

Meader v. Incorporated Town of Sibley, 197 Ia. 945, 198 N. W. 72, 74,

said:

"It is a well established rule that if the intention of the parties and the consideration on which an obligation is assumed by one party is that *there shall be a corresponding obligation on the part of the other party, the law will imply such obligation.*"

See, also,

J. C. Millett Co. v. Park & Tilford, supra, (123 F. S. 484);

Kelly-Springfield Tire v. Bobo, supra, (4 Fed. (2d) 71);

Mills-Morris Co. v. Champion Spark Plug Co., supra, (72 F. (2d) 38 (C. C. A. 6) (the latter noted in 23 Col. L. Rev. 61, 63 (1931); 31 Col. L. Rev. 830).

wherein the Court applied similar rules to comparable contracts, and

Republic Pictures v. Rogers, 213 F. (2d) 662 (C.C.A. 9) (certiorari and rehearing denied, 348 U.S. 858 and 890).

As to the second element of the renewal provision, notice of the offeree's "desire", "election", etc., as a means of acceptance is so common that further authorities should not be required.

The renewal provision was designed to accomplish its obvious purpose of providing for a new term of the contract upon the same terms upon plaintiff's notice to that effect. It must be so interpreted.

To again note Chief Justice Holmes—

> "Business contracts must be construed with business sense."
>
> *The Kronprinzessin Cecilie,* 244 U.S. 12, 60 L.ed. 960,

and from the *Park & Tilford* case (123 F.S. 484, 489)—

> "* * * *contracts are often formed between business men of long experience in the trade* and familiar with the relationship which they are undertaking, *without explicit discussions of the details* of the promised performance."

b. It Is Axiomatic, and Statutorially Declared, That a Contract Comes Into Being Upon the Communication of the Acceptance of an Offer—Whether Revocable, Continuing or Irrevocable.

As to the second element of the option, there is probably no more universal method of accepting offers, revocable and irrevocable, than that of giving notice, notify, etc., etc.

Here the contract so provided in the simplest language, i.e., the "distributor shall so notify Calvert", as was done in this case, by writing (Plaintiff's Exhibit 3). The only limitation upon the acceptance of the offer is that it be accepted by such notification "not less than 30 days before December 31st, 1952", which was conformed to by giving such notification on November 18, 1952.

Both the provision for acceptance and the communication of the acceptance fully conforms to the state statute expressly providing for these steps in the creation of a contract.

See Sections 1581-1586 of the Civil Code, in part:

"If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; *but in other cases any reasonable and usual mode may be adopted.*"

(Section 1582.)

"*Consent is deemed to be fully communicated between the parties as soon as the party accepting a proposal has put his acceptance in the course of transmission to the proposer,* in conformity to the last section."

(Section 1583.)

"A proposal may be revoked at any time before its acceptance is communicated to the proposer, *but not afterwards.*"

(Section 1586.)

The cases cited to the immediately preceding point of argument are adequate and controlling precedent for—both the provision of the offer, and the method of acceptance in this case.

It is, therefore, respectfully submitted that the literal wording of the renewal clauses of the instant contract both, alone, and as fortified by every aid to in-

terpretation permitted by statute and judicial precedent, can not be construed to support the instant judgment and that the judgment must be reversed, with directions to enter judgment for such damages as plaintiff may establish as having been occasioned by the repudiation of the contract created by plaintiff's timely acceptance of the offer to renew the contract, upon plaintiff's election and timely notification to Calvert as provided in the contract and conclusively established by this record.

B. THE MATERIAL FINDINGS ARE CONTRARY TO THE EVIDENCE.

Finding IV is to the effect that the allegations of paragraph IX of the complaint, first cause of action, are untrue; whereas, the testimony of witness Lewis is clear and uncontradicted that Calvert ceased its efforts to promote the sale of its products in support of plaintiff's efforts to distribute them under the contract and, also, did promote sales in a discriminatory manner in favor of plaintiff's competitor, Julliard. Such "finding" cannot be made to jibe with any version of this record.

Finding V is to the effect that defendant's first "special" defense to this cause of action is true. Such "special" defense is that the undertaking to promote the sale of Calvert products is unlawful. There is no factual support for any such "allegation" or finding and the statute, the evidence and the industry custom are plainly to the contrary.

As this subject is fully detailed in part A-1, of argument, it is unnecessary to repeat the references to the record and to controlling authority therein noted—which demonstrate that the purported findings last noted cannot be sustained upon the record in this cause.

Finding VIII is to the effect that "that it is untrue that Calvert did not have a lawful reason for not shipping" the 900 cases referred to in the order declared upon in the second cause of action and detailed in part A-2, of argument. The "finding" is patently a negative pregnant and conclusionary, but is, specifically, without factual support as set forth in the portion of the foregoing argument last cited. As the evidentiary deficiencies in defendant's presentation on this point are there noted they are omitted here, in avoidance of repetition.

Finding XI is to the effect that the renewal provision did not constitute a continuing offer to renew the contract upon plaintiff's election to renew and giving of notice to that effect in accordance with the terms of the contract. Since defendant did not offer any evidence, and objected to the receipt of any evidence proffered by plaintiff upon the meaning and interpretation of the renewal clause of the contract, it is patent there is no factual issue to be resolved on this score and the purported finding can be nothing but an erroneous conclusion of law. The error in construing the contract as other than a continuing or irrevocable offer to plaintiff to renew the contract, as

provided in paragraphs 11 and 12 thereof, is fully detailed in part A-3, of argument and need not be restated here.

Finding XII is that plaintiff has not been damaged —in the face of the express and approved stipulation that the evidence of plaintiff's damage be reserved until the resolution of the issues as to defendant's liability had been determined.

For these reasons the findings are outside the issues and but constitute conclusions of law contrary to the evidence.

C. THE CONCLUSIONS OF LAW AND THE JUDGMENT ARE ERRONEOUS AND DO NOT RESPOND TO THE ISSUES OR TO THE EVIDENCE.

The first conclusion of law, that the contract "was not breached by Calvert," is contrary to defendant's formal admissions and the uncontradicted evidence; and having no evidence to which to respond, the judgment and conclusion are unsupported and erroneous.

The second conclusion of law, to the effect that the contract terminated on December 31, 1952, is contrary to the terms of the contract, in that first the contract, itself, provided for a thirty day period of operation after that date for the resale of Calvert products by plaintiff, in accordance with the contract, in all events, and for the return of the remaining inventory, in the event the contract were not renewed; secondly, the contract provided for its renewal for a succeeding period and it was renewed in accordance with its terms.

The third conclusion of law is that the contract did not provide an option to renew, contrary to any lawful or possible interpretation of the precise terms of the contract.

The fourth conclusion of law is that "the contract pleaded in plaintiff's complaint * * * was and is illegal, null and void," whereas, first, the contract declared upon is the precise written contract incorporated by reference and appended to the complaint as an exhibit, and none other; and, secondly, the contract set forth and "relied upon" is lawful in all the respects defendant has attempted to assert—but failed to support by any means or by any principle of law.

The fifth, and final, conclusion of law, and the judgment, is that plaintiff take nothing herein—notwithstanding the admissions of defendant's answer and the uncontradicted testimony and conceded documentary evidence adduced in support of the allegations of plaintiff's complaint.

Since plaintiff has set forth evidence and admissions and the principles of statutory and decisional law of the state in adequate detail in support of the foregoing portions of the argument, it is respectfully submitted that the labors of the Court need not be duplicated by a repetition of categorical demonstration of error in each of these conclusions. In this connection may we again call to the attention of the Court that plaintiff sought to avoid these misprisions, by submitting detailed objections to the proposed findings, conclusions and judgment (T 35-38), in the attempt to secure the resolution of the cause in a

manner responsive to the issues and the proof and to provide suitable record for review.

D. PLAINTIFF WAS DEPRIVED OF A FAIR TRIAL.

It is evident that the cause was actually resolved by the adoption of defendant's erroneous and insupportable theory that the entire contract was unlawful for some reason that remains obscure. The anomaly of the party to a contract asserting that an instrument it prepared and specifically relied upon, in defense of the claims incorporated in the complaints and, actually, relied upon by the Court below in adopting five of the twelve findings—was criminal is unprecedented, and was not supported in argument by a single citation of authority, nor documented by any evidentiary showing whatever.

It strains credulity that the instant contract is unlawful "on the face" and there was no evidence produced whence a finding of illegality, *de hors* the instrument, might emanate, hence the Court below should have followed the ruling of the District Court (95 F. Supp. 552) affirmed by this Court (200 Fed. (2d) 561) and by the Supreme Court in

> *Partmar Corp. v. Paramount Theatres Corp.,* supra, (347 U. S. 532, 98 L. ed. 89, 74 S. Ct. 414)

holding that, where the agreement is not invalid on its face, no party may recover on the theory that the contract is invalid for reasons not appearing therein—in the absence of some evidentiary showing that some "illegality" exists.

It is further submitted that the Court should join with the California Court in the recent case of

Doke v. Brockhurst, 150 A.C.A. 608, 611, ... P. (2d), ...,

in affirming a plaintiff's recovery on breach of contract and resolving the same question of substantive law, as follows:

> "* * * Dawe *cannot defend on the ground that the contract is unenforceable* because of the statute of frauds *and at the same time seek to enforce one of the terms of the contract against Doke* for Dawe's benefit. If the contract is unenforceable against Dawe it must be equally unenforceable against Doke."

Herein, however, appears the abberational holding that a contract may be advanced in defense by one who claims it is unlawful to defeat an action to enforce the same contract.

PART FIVE.

CONCLUSION AND SUBMISSION.

It is respectfully submitted that the instant action was not tried upon the issues, and admissions and the evidence in the cause—but resolved upon defendant's untenable assertion that the entire contractural instrument was unlawful on its face, no evidence *de hors* the instrument having been offered in support of such claim; that, in consequence, the findings, conclusions of law, and judgment do not relate to the issues, or to the factual showing presented below; that such pre-

tended illegality of the contractural instrument is contrary to the specific substantive statutory provisions controlling the subject matter, both as enacted by the state legislative body and as interpreted by the state's licensing agency and Courts of this district and circuit; that plaintiff established each of the contested issues, not admitted by defendant, by adequate evidence and no counter-showing was attempted; and that, for each of these reasons, the judgment is unsupported and erroneous with respect to each of the three causes of action set forth in plaintiff's complaint, and should be reversed.

Dated, San Francisco, California,
June 10, 1957.

J. Albert Hutchinson,
Leon A. Blum,
By J. Albert Hutchinson,
Attorneys for Appellant.

(Appendix I Follows.)

Appendix.

Appendix I

Agreement
Calvert Distillers Corporation
and
Key Distributing Co.
Division of
J. C. Milett Co., San Francisco
960 Arlington Avenue
Oakland 8, California

Dated March 14th, 1952.

This agreement made this 14th day of March, 1952, by and between Calvert Distillers Corporation of 405 Lexington Avenue, City and State of New York, hereinafter called "Calvert" and Key Distributing Co., Division of J. C. Milet Co., San Francisco, 960 Arlington Avenue, Oakland 8, California, hereinafter called "Distributor"—

Witnesseth:

Whereas, Calvert has the sole and exclusive right to distribute within the United States, the alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., and from time to time may have the exclusive right to sell other alcoholic beverages, and

Whereas, Distributor warrants that it is a licensed distributor of alcoholic beverages in the State of California, holding the necessary Federal, State and local permits authorizing Distributor to distribute alcoholic

beverages in California, and that there are no actions pending or contemplated within the knowledge of Distributor that would in any way jeopardize any of said licenses, and

Whereas, Distributor desires to act as a distributor of alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., in the State of California,

Now, therefore, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Calvert hereby appoints Distributor as a distributor of such of the alcoholic beverages produced by The Calvert Distilling Co., and Carstairs Bros. Distilling Co., Inc., as are listed on Exhibit A attached hereto within the following territory in the State of California:

Alameda and Contra Costa Counties.

2. Distributor hereby accepts the appointment as such distributor and agrees to sell and distribute to retail licensees such alcoholic beverages within the designated territory. Distributor warrants that during the year ending December 31st, 1951, the proportion of its total sales of alcoholic beverages represented by Calvert products was 23 (%) per cent. Distributor agrees that during the term of this contract, it will spend no less than 23 (%) per cent of its time and effort on the sale of Calvert products and not less than 23 (%) per cent of the money spent by it on

advertising and sales promotion shall be expended on Calvert products.

3. It is understood and agreed that the prices at which Calvert shall sell its products to Distributor and the prices at which Distributor shall buy Calvert products from Calvert shall be the prices currently in effect at the time of shipment. Calvert reserves the right to change its prices in its sole discretion from time to time on 15 days' written notice. (Any change necessitated by a change in taxes, whether Federal, State or local, shall be made as required by the tax legislation, without regard to the foregoing notice provision.) Calvert also reserves the right to determine the point of origin and method of shipment, although it shall endeavor to cooperate with Distributor to determine a mutually satisfactory method of shipment. When, as and if Calvert should reduce its prices (except for tax changes) during the term of this agreement, Calvert will give a floor stock adjustment to Distributor on its inventory, provided such adjustment is legal under all prevailing laws and regulations.

4. The amount of credit, if any, extended to and the terms of payment by Distributor to Calvert for the products sold to Distributor by Calvert shall be determined by Calvert from time to time in its sole discretion. It is agreed that the terms stipulated by Calvert on each invoice covering products sold to Distributor by Calvert shall represent the terms of payment with respect to each individual shipment and shall be of the essence of this contract.

5. Calvert agrees to supply its products to Distributor to the best of Calvert's ability, but it is understood and agreed that all or some products may not always be available to fill all orders and Calvert shall have the right to allocate to Distributor such proportion of the available supplies of its products as Calvert shall decide in its sole discretion. Calvert reserves the right not to ship any orders received where such orders would result in an inventory in the hands of Distributor greater than a 45-day inventory, based on the rate of sales of Calvert products by Distributor for the six months prior to the date of this contract.

6. Calvert agrees to promote the sales of its products and to advertise its products in a manner consistent with the type of merchandise and the cases sold. Calvert shall have the sole right to determine the amount of sales promotion and advertising and the media used for advertising.

7. Distributor agrees that it will maintain an adequate sales force properly to represent and to promote the sales of Calvert's products in its designated territory. Distributor agrees to keep this sales force properly informed as to all Calvert's policies and to train them to sell merchandise in a manner which shall be a credit to Distributor and to Calvert. Distributor warrants that it will do nothing at any time to jeopardize its own standing or reputation or license as a wholesaler and will at all times obey all laws, rules and regulations pertaining to the distribution of alcoholic beverages.

8. Distributor agrees that it will maintain an inventory of Calvert products at all times equal to Distributor's average sales for 45 days.

9. Distributor represents that at the time of the execution of this agreement, it is acting as a distributor of the brands of alcoholic beverages listed on Exhibit B attached hereto.

Distributor agrees that it will not undertake the distribution of any additional brands of alcoholic beverages without giving Calvert 90 days' written notice of its intention so to do.

10. At the date of the execution of this agreement, the prices to be charged to Distributor by Calvert for Calvert products are those shown on Exhibit A attached hereto. The resale prices to be charged by Distributor in connection with the sale of Calvert products to retailers are those shown on Exhibit A attacher hereto, and in accordance with the Fair Trade Act of the State of California, Distributor agrees that it will not sell Calvert products to retailers at prices less than those shown on Exhibit A. Calvert, however, reserves the right to change the resale prices on sales by Distributor to retailers from time to time.

11. This contract shall be effective for a period of ten months from March 1, 1952. If Distributor desires to renew the contract, he shall so notify Calvert not less than 30 days before December 31st, 1952.

12. In the event that this contract is not renewed, Distributor agrees that within 30 days after December

31st, 1952, it will return to Calvert at its invoice price all of the Calvert merchandise remaining in its inventory.

13. A failure on the part of either party to insist on full compliance with any particular provision of this agreement shall not be construed as a waiver of the party's rights under that provision, and shall not affect any other provision of the agreement.

14. In the event that there is any change in the ownership of Distributor—if a partnership by any change in partners, if a corporation by any change in stock ownership, or if individually owned by any change in said ownership, or if there shall be any change whatever in the management of Distributor, which Calvert shall consider adverse to its interests, Calvert shall have the right within 30 days after notice of the change to cancel this agreement.

15. This agreement shall be interpreted under the laws of the State of California.

16. This agreement represents the entire agreement between the parties and cannot be modified except in writing duly executed by both parties.

Calvert Distillers Corporation
By Walter F. Terry
Vice-President

Key Distributing Co., Division of
J. C. Millett Co., San Francisco
By J. C. Millett

(Exhibits A and B omitted.)